

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>DENNIS SCULLY, JR.</b>	:	DETERMINATION
		DTA NO. 816722
for Revision of Determinations or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Periods June 1, 1992 through November 30, 1994	:	
and March 1, 1995 through May 31, 1995.	:	

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Petitioner, Dennis Scully, Jr., 105 West 55<sup>th</sup> Street, Apt. 6C, New York, New York 10019, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods June 1, 1992 through November 30, 1994 and March 1, 1995 through May 31, 1995.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on June 10, 1999 at 10:30 A.M., which date began the six-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Terrence M. Boyle, Esq. (Andrew S. Haber, Esq., of counsel).

***ISSUE***

Whether, during the periods at issue, petitioner was a person responsible for collection and payment of sales and use taxes on behalf of Scully, Scandinavian Ventures, Ltd.

### ***FINDINGS OF FACT***

1. In January 1992, petitioner and his father purchased a furniture business from Wim and Karen Scandinavian Furniture, Inc., which had locations in Manhattan and Port Chester. Prior to the purchase, petitioner and his father had formed a corporation, Scully, Scandinavian Ventures, Ltd., with petitioner as president and 60% percent shareholder. Petitioner's father held the remaining 40% of the stock of the corporation. The purchase of the business was accomplished through a down payment and the issuance of promissory notes to the previous owners that were to be paid within five years. The initial payment on the promissory notes was to be made in January 1993. Petitioner and his father had personally guaranteed the promissory notes.

2. During the first year of the business, petitioner realized that the corporation would not be able to make the payments due on the promissory notes in January 1993. As a result, petitioner began negotiations with the sellers in an attempt to either extend the payment period or reduce the amount of the payments. These efforts failed, and the sellers opted, as was their right under the contract of sale, to call in all the promissory notes when the initial payment was not made. In addition, as petitioner and his father had personally guaranteed the promissory notes, the sellers began legal proceedings against them to collect on the notes. This action by the sellers added additional financial strain on petitioner as it became necessary to hire legal counsel to defend himself in this action.

3. In an attempt to keep the business going, petitioner made the decision not to pay to New York State the sales tax that had been collected. However, as the business continued to fail petitioner decided to close the business in May 1994. In October 1994, petitioner filed for

personal bankruptcy.<sup>1</sup> The business was eventually taken over by one of its competitors, and petitioner lost all access to the books and records of the business operation.

4. During the periods at issue, petitioner operated the business on a daily basis, made all financial decisions, had check signing authority, actually signed the checks of the business and signed the New York State and local sales and use tax returns of Scully, Scandinavian Ventures, Ltd.

5. During the quarters listed, Scully, Scandinavian Ventures, Ltd. filed New York State sales and use tax returns as follows:

<b>Quarter</b>	<b>Amount Due</b>	<b>Filing and Tax Status</b>
August 31, 1992	\$17,148.62	Late filed-partial payment
November 30, 1992	\$26,218.85	Timely filed-no remittance
February 28, 1993	\$29,459.96	Timely filed-no remittance
May 31, 1993	\$ 8,329.47	No remit-dishonored check
August 31, 1993	\$ 7,151.89	Late filed-paid
November 30, 1993	\$10,033.67	Late filed-partial payment
February 28, 1994	\$11,214.59	Timely filed-partial payment

All returns were signed by petitioner as president except the August 31, 1992 return, which was signed by the business's accountant. Petitioner also signed, as president, the corporation's New York State sales and use tax returns for the months of December 31, 1992, January 31, 1993, March 31, 1993, April 30, 1993, September 30, 1993, October 31, 1993, December 31, 1993, January 31, 1994 and March 31, 1994.

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<sup>1</sup> Nothing in the record would indicate the outcome of petitioner's proceeding in bankruptcy. Moreover, petitioner has raised no issues regarding such proceeding.

6. On October 23, 1995, the Division of Taxation (“Division”) issued to Dennis Scully, Jr. the following Notices of Determination:

<b>Quarter</b>	<b>Assessment #</b>	<b>Amount of Tax Due</b>
August 31, 1992	L-011242567-3	\$10,531.45
November 30, 1992	L-011242569-1	\$26,218.85
February 28, 1993	L-011242568-2	\$29,459.96
May 31, 1993	L-011242566-4	\$8,329.47
August 31, 1993	L-011242565-5	-0-
November 30, 1993	L-011242564-6	\$500.00
February 28, 1994	L-011242563-7	\$17.60

The notices stated that they were being issued because petitioner was an officer or responsible person of Scully, Scandinavian Ventures, Ltd. Penalties and interest were imposed for all quarters except February 28, 1994, when only interest was imposed.

7. On October 23, 1995, the Division issued to Dennis Scully, Jr., as an officer or responsible person of Scully, Scandinavian Ventures, Ltd., three Notices of Estimated Determination for the quarters ended May 31, 1994 (assessment # L-011242562-8), August 31, 1994 (assessment # L-011242561-9) and November 30, 1994 (assessment # L-011242560-1). A fourth Notice of Estimated Determination was issued to petitioner on October 26, 1995 for the quarter ended May 31, 1995 (assessment # L-011242559-1) . Each of these notices stated that “[t]he estimated assessment on which this assessment is based, was issued because a required tax return was not filed by the business named above” (Scully, Scandinavian Ventures, Ltd.).

8. On May 19, 1999, petitioner filed with the Division a New York State and Local Sales and Use Tax Return for the quarter ended May 31, 1994 on behalf of Scully, Scandinavian

Ventures, Ltd. The return was signed by petitioner as president, indicated it was the corporation's final return and stated that sales tax was due in the amount of \$10,702.00.

Payment of the tax due was not made. At the hearing, the Division conceded that this was the final return of the corporation, that the tax assessed for this quarter be reduced to the amount shown on the return and that the remaining three notices of estimated determination be canceled.

### ***CONCLUSIONS OF LAW***

A. Tax Law § 1133(a) provides that “every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article.” Persons required to collect tax are defined in Tax Law § 1131(1) to include “any officer, director or employee of a corporation . . . who as such officer, director or employee is under a duty to act for such corporation . . . in complying with any requirement of this article . . . .”

B. In determining an individual's personal liability under Tax Law § 1133(a), it is a settled matter that the holding of corporate office does not result in the *per se* tax liability of an officeholder (*Vogel v. New York State Dept. Of Taxation & Fin.*, 98 Misc 2d 222, 413 NYS2d 862; *Chevlowe v. Koerner*, 95 Misc 2d 388, 407 NYS2d 427; *Matter of Unger*, Tax Appeals Tribunal, March 24, 1994, *confirmed* 214 AD2d 857, 625 NYS2d 343, *lv denied* 86 NY2d 705, 632 NYS2d 498). Rather, whether a person is an officer or employee liable for tax must be determined based upon the particular facts of each case (*see, Matter of Cohen v. State Tax Commn.*, 128 AD2d 1022, 513 NYS2d 564; *Stacey v. State*, 82 Misc 2d 181, 368 NYS2d 448; *Chevlowe v. Koerner, supra*, 407 NYS2d at 429; *Matter of Hall*, Tax Appeals Tribunal, March 22, 1990, *confirmed* 176 AD2d 1006, 574 NYS2d 862; *Matter of Martin*, Tax Appeals Tribunal, July 20, 1989, *confirmed* 162 AD2d 890, 558 NYS2d 239; *Matter of Autex Corp.*, Tax Appeals

Tribunal, November 23, 1988). Factors to be considered, as set forth in the Commissioner's regulations, include whether the person was authorized to sign the corporate tax return, was responsible for managing or maintaining the corporate books or was permitted to generally manage the corporation (20 NYCRR 526.11[b][2]). As summarized in *Matter of Constantino* (Tax Appeals Tribunal, September 27, 1990):

[t]he question to be resolved in any particular case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee. The case law and the decisions of this Tribunal have identified a variety of factors as indicia of responsibility: the individual's status as an officer, director, or shareholder; authorization to write checks on behalf of the corporation; the individual's knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; the individual's economic interest in the corporation (*Cohen v. State Tax Commn.*, *supra*, 513 NYS2d 565; *Blodnick v. State Tax Commn.*, 124 AD2d 437, 507 NYS2d 536,538, *appeal dismissed* 69 NY2d 822, 513 NYS2d 1027; *Vogel v. New York State Dept. Of Taxation & Fin.*, *supra*, 413 NYS2d at 865; *Chevlowe v. Koerner*, *supra*, 407 NYS2d at 429; *Matter of William D. Barton*, [Tax Appeals Tribunal, July 20, 1989]; *Matter of William F. Martin*, *supra*; *Matter of Autex*, *supra*).

Summarized in terms of a general proposition, the issue to be resolved is whether petitioner had, or could have had, sufficient authority and control over the affairs of the corporation to be considered a person under a duty to collect and remit the unpaid taxes in question (*Matter of Constantino*, *supra*; *Matter of Chin*, Tax Appeals Tribunal, December 20, 1990).

C. Upon review of the entire record, it becomes clear that petitioner was properly held responsible for the sales tax obligations of the corporation. In order to prevail in this case, "petitioner was required to establish by clear and convincing evidence that he was not an officer having a duty to act on behalf of the corporation, i.e., that he lacked the necessary authority or he had the necessary authority, but he was thwarted by others in carrying out his corporate duties

through no fault of his own (citations omitted)” (*Matter of Goodfriend*, Tax Appeals Tribunal, January 15, 1998). Neither of these circumstances accurately describes the facts of this case.

D. Petitioner was the majority shareholder of Scully, Scandinavian Ventures, Ltd. and held the office of president. He had check signing authority, actually signed the business’s checks and signed the sales and use tax returns for the periods at issue. More importantly, petitioner was directly involved in the daily operational aspects of the business operation, participated in the negotiations with the previous owners in an effort to restructure the terms of the contract of sale and made the decision to forego paying the sales tax due in order to pay other creditors. It was also petitioner’s decision to cease doing business and to close up the stores.

It does not appear that there were any restrictions on petitioner’s ability or authority to inspect the corporate books and records. Petitioner had knowledge of the corporation’s financial condition including, specifically, the problems with payment of sales taxes (*Matter of Risoli v. Commissioner of Taxation and Finance*, 237 AD2d 675, 654 NYS2d 218). Simply put, the record does not support the conclusion that petitioner did not have control over corporate affairs (*see, Matter of Harshad Shah*, Tax Appeals Tribunal, February 25, 1999). Accordingly, petitioner was properly held responsible for the corporation’s sales tax payment obligations, including the penalties imposed with regard to the corporation’s nonpayment and late payment of sales taxes for some of the quarterly periods at issue.

E. The petition of Dennis Scully, Jr. is granted to the extent indicated in Finding of Fact “8”, but in all other respects is hereby denied. The notices of determination issued by the Division of Taxation on October 23, 1995 are sustained. The Notice of Estimated Determination issued by the Division of Taxation on October 23, 1995 for the quarter ended May 31, 1994, as modified in Finding of Fact “8”, is sustained.

DATED: Troy, New York  
November 18, 1999

/s/ Thomas C. Sacca  
ADMINISTRATIVE LAW JUDGE